

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

DAVID MCCAIN,

Petitioner,

v.

WANZA JACKSON, Warden,

Respondent.

CASE NO. 2:04-cv-135

JUDGE GRAHAM

MAGISTRATE JUDGE ABEL

OPINION AND ORDER

On February 3, 2006, the Magistrate Judge issued a *Report and Recommendation* recommending that the instant petition for a writ of habeas corpus be dismissed. Petitioner has filed objections to the Magistrate Judge's *Report and Recommendation*. Petitioner objects to all of the Magistrate Judge's recommendations.

Petitioner specifically objects to the Magistrate Judge's recommendation that claims 1-4 and 6-8 be dismissed as procedurally defaulted. As noted by the Magistrate Judge, petitioner failed to present any of the foregoing claims, including his allegations of ineffective assistance of appellate counsel, to the Ohio Supreme Court. Petitioner attempted to file a delayed appeal of the appellate court's April 18, 2005, decision denying his application to reopen the appeal pursuant to Ohio Appellate Rule 26(B) as untimely; however, the Clerk of the Ohio Supreme Court refused to file his attempted delayed appeal. *See Report and Recommendation*, at 7; *Exhibits to Motion to Reactivate Proceedings*, Doc. No. 26. The ineffective assistance of counsel cannot constitute cause for petitioner's procedural default in failing to file a timely appeal to the Ohio Supreme Court, since petitioner had no right to counsel in such proceedings. *See Pennsylvania v. Finley*, 481 U.S. 551,

555 (1987); *Gulertekin v. Tinnelman-Cooper*, 340 F.3d 415, 425 (6th Cir. 2003).

Pursuant to 28 U.S.C. 636(b)(1), this Court has conducted a *de novo* review of those portions of the *Report and Recommendation* objected to by petitioner. In view of the foregoing, and for the reasons discussed at length in the Magistrate Judge's *Report and Recommendation*, petitioner's objections are **OVERRULED**.

The *Report and Recommendation* is **ADOPTED** and **AFFIRMED**. This case is hereby **DISMISSED**.

It is so ORDERED.

s/James L. Graham
JAMES L. GRAHAM
United States District Judge

DATE: March 1, 2006